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NO. 89-156

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE, ET AL.
Petitioners

v.

EDWARD and DEBORA DAVENPORT, ET AL.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE CONNECTICUT, AND OTHER AMICI THAT APPEAR ON THE INSIDE COVER*

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INTEREST OF AMICI CURIAE

Amici curiae are States, each of which views criminal restitution as an important sentencing option in its criminal justice system. The Third Circuit's decision, which construed restitution as a dischargeable debt in Chapter 13 bankruptcy proceedings, threatens to deprive States of this option in many cases. With the option of seeking restitution significantly compromised, States will have greater difficulties in devising punishments to fit the crime and in meaningfully dispensing criminal justice. The amici States accordingly support the Commonwealth of Pennsylvania in urging this Court to review the Third Circuit's decision.

By allowing convicted offenders to discharge restitution orders in Chapter 13 bankruptcy proceedings, the Third Circuit's decision curtails the effectiveness of restitution as a measured and narrowly-tailored punishment in particular criminal cases. The decision will likely result in offenders receiving sentences disproportionate to their crimes, crime victims having to go without the benefits of compensation, and the public losing confidence in its criminal justice system.

The Third Circuit's decision also stands in conflict with this Court's decision in Kelly v. Robinson, 479 U.S. 36 (1986). It would be a most surprising result if Congress recognized the historical exemption of criminal judgments when it enacted the Bankruptcy

Code, as the Kelly Court stated, and yet in the same Code made provision for the discharge of criminal restitution in Chapter 13 proceedings.

For these reasons, this Court should grant certiorari.

ARGUMENT

Amici had thought that this Court in Kelly v. Robinson, 479 U.S. 36 (1986), had laid to rest the notion that convicted criminals could escape punishment by filing bankruptcy petitions. Seven Justices joined in expressing "serious doubts whether Congress intended to make criminal penalties 'debts' within the meaning of [11 U.S.C.] § 101(4)" (the Bankruptcy Code section defining "debt"). Id. at 43-49. The majority went on to hold that criminal restitution fell within the § 523(a)(7) exception to discharge for fines, penalties, and forfeitures, which is primarily applicable to Chapter 7 liquidation and Chapter 11 business reorganization proceedings. Id. at 50-53.

Justice Marshall noted in dissent, however, that the Court's opinion left open the possibility that criminal restitution would become dischargeable under the wage earner reorganization provisions of Chapter 13, which contain no applicable exception to discharge. Id. at 59 n.6 (Marshall, J., dissenting). The Third Circuit's decision, along with that of a number of district and bankruptcy courts, see Petition for Certiorari, has now made that possibility a reality. This Court should grant certiorari to review these decisions because of the importance of the issue to the administration of criminal justice in the States and because these decisions conflict with this Court's dicta in Kelly.

1. Restitution is a valuable tool in meting out punishment that fits the crime. Restitution is particularly appropriate in crimes such as welfare, consumer, or business fraud, in which the offender has improperly taken the property of others. See, e.g., Kelly v. Robinson, 479 U.S. at 38-39 (welfare fraud). Ordering the offender to make restitution to the victim forces him "to confront, in concrete terms, the harm his actions have caused." Id. at 49 n.10. Like a fine, restitution punishes without incarceration but, unlike a fine, restitution compensates the victim. Restitution thus provides the middle ground in a State's sentencing arsenal.[1]

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[1]In many cases, of course, it will be appropriate to combine a restitution order with a fine, prison term, or other sentencing alternative.

The possibility that an offender sentenced to make restitution will file for bankruptcy is not insignificant. Many, particularly those convicted of welfare fraud, face financial difficulties aside from the obligation to make restitution. The temptation to satisfy the restitution obligation in a manner similar to that used for ordinary civil debts, now enhanced by the Third Circuit's decision, is surely hard to resist.

The Third Circuit's ruling thus threatens to create a form of revolving door system of justice in which an offender receives a restitution order in State court and then discharges it in federal bankruptcy court. This result will not advance public confidence in our criminal justice system, already lowered by the perception that offenders

escape punishment for various other reasons unrelated to guilt or innocence. The natural reaction, moreover, to the compromising of restitution orders by bankruptcy courts is for States to refrain from seeking and imposing such orders. As a consequence, offenders will face a greater likelihood of incarceration, burdens on our overcrowded prison system will increase, and crime victims will lose the compensation that restitution provides. The States obviously desire to avoid this scenario.

2. The Third Circuit's decision stands in conflict with this Court's opinion in Kelly, which Connecticut and other amici States sought in this Court less than three years ago. The extensive discussion in Kelly of the proposition that criminal

restitution does not constitute a debt, although arguably unnecessary to the Court's holding, should not be lightly tossed aside. This point is especially true because the Court focused on the intent of the 1978 Congress, something that ordinarily does not change over time.

The Kelly Court relied, first, on the fact that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders," and that Congress did not express any intent to alter this traditional approach. 479 U.S. at 44, 47. And the Court also felt it fair to presume that Congress acted in accord with the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal

proceedings." Id. at 47. The Court expressed the concern that treatment of restitution as a dischargeable debt "could lead to federal remission of judgments imposed by state criminal judges." Id. at 49.

These concerns are not limited to Chapter 7 proceedings. Logically they extend to the entire Bankruptcy Code, including Chapter 13. Congress could not have recognized the historical and theoretical basis for exempting criminal judgments from the bankruptcy process and at the same time deemed criminal restitution to constitute a dischargeable debt under Chapter 13. The Third Circuit's decision thus conflicts with this Court's opinion in Kelly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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